tained by the courts unless clearly unconstitutional.[17] It is one thing for the courts to consider a statute unwise and quite another to hold that the legislature has overstepped the limits of its discretion. But, as held by the slight weight of authority,[18] there seems to be no sound ground upon which a bonus statute can be supported.

ESTOPPEL OF AN ATTORNEY TO ACT AGAINST HIS CLIENT. — In few fields has human inability to serve two masters been more clearly recognized or more scrupulously regarded than in the relation of attorney and client. The duty of an attorney to abstain from inconsistent employment was recognized very early in our law [1] and, to the credit of the profession, few reported cases are found which involve a departure from professional faith and duty.[2] Nor has this obligation been restricted merely to the duration of the relation.[3] While the fact alone that he has once acted as counsel for a man will not bar an attorney from thereafter representing that man's adversary,[4] this is true only when such service is consistent with, and not hostile to, the interests of the former.[5] The test of consistency is ". . . whether accepting the new retainer will require him, in forwarding the interests of his new client, to do anything which will injuriously affect his former client in any matter in which he formerly represented him, and also whether he will be called upon, in his new relation, to use against his former client any knowledge or information acquired through their former connection." [6] If the new service is inconsistent, he cannot act. And this rule is applicable to criminal as well as to civil proceedings. Thus, one who acted as counsel for a plaintiff in an action for malicious prosecution is disqualified to serve as prosecuting attorney against him upon a subsequent indictment for the alleged crime which was involved in that action.[7] Conversely, a defendant in a criminal prosecution cannot be represented by an attorney who had previously, as solicitor-general of the state, instituted the proceeding against him.[8] The recent

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[17] Jones *v.* Portland, 245 U. S. 217 (1917). See 21 HARV. L. REV. 277.

[18] Mead *v.* Acton, 139 Mass. 341, 1 N. E. 413 (1885); Bush *v.* Board of Supervisors, 159 N. Y. 212, 53 N. E. 1121 (1899); Beach *v.* Bradstreet, 85 Conn. 344, 82 Atl. 1030 (1912). See 26 HARV. L. REV. 92. *Contra*, Brodhead *v.* City of Milwaukee, 19 Wis. 624 (1865); State *v.* Handlin, 38 S. D. 550, 162 N. W. 379 (1917). It should be noted that Brodhead *v.* City of Milwaukee, *supra*, relied principally upon Speer *v.* Blairsville and Booth *v.* Town of Woodbury, *supra*, note 8, neither of which seem in point.

[1] MIRROUR OF JUSTICES, chap. 2, sec. 5.

[2] Hatch *v.* Fogerty, 40 How. Pr. 492, 504 (1871).

[3] *In re* Boone, 83 Fed. 944 (1897); People *v.* Gerold, 265 Ill. 448, 107 N. E. 165 (1914); Hatch *v.* Fogerty, *supra*.

[4] Purdy *v.* Ernst, 93 Kan. 157, 143 Pac. 429 (1914); Messenger *v.* Murphy, 33 Wash. 353, 74 Pac. 480 (1903).

[5] *In re* Boone, *supra;* Purdy *v.* Ernst, *supra*. See 1 FERGUSON, IRISH PRACTICE, 57, 58.

[6] *In re* Boone, *supra*, 952. See also CANONS OF ETHICS, AM. BAR ASS., Sec. II (6).

[7] State *v.* Rocker, 130 Ia. 239, 106 N. W. 645 (1906). And see Wilson *v.* State, 16 Ind. 392 (1861).

[8] Gaulden *v.* State, 11 Ga. 47 (1851).

decision, *People ex rel. Livers et al.* v. *Hanson et al.*,[9] shows that the same principle applies in the case of the hybrid proceeding of *quo warranto*.

Assuming then a case in which the attorney ought not to act, there still remains the problem of procedure. How is the client to protect himself against the adverse activity of his former counsel? An injunction will lie against the attorney.[10] If he attempts to appear in court, he may be excluded by the court in the exercise of its plenary power over its officers, upon the motion of the former client.[11] The Livers case,[12] however, seems to have raised the point in a novel way. There, the fact of the state's attorney's prior inconsistent employment was set forth in the plea, and the Supreme Court of Illinois held the plea good. It seems going rather far to hold that it raises a good defense to a proceeding brought in the name of the people of the state, when the defendant pleads merely that the attorney presenting the claim of the people is disqualified. If an ordinary action at law were brought by A against B, surely a plea by B that A's attorney was disqualified would not be considered a good defense to A's action. And the fact that A is in this case the state, should not change the principle.

No authority is cited for the procedure in the Illinois case. Cases which in the past seem to have tended in that direction fall far short of its result, and are clearly to be distinguished. The case of *Berry* v. *Jenkins* [13] is very unsatisfactorily reported, but it seems clear that the plaintiff in that case must have assented to the dismissal of the proceedings, which distinguishes the case. In the case of *Provident Institution for Savings* v. *White*,[14] a bill of interpleader filed by the attorney for one of the defendants, who purported to act for the plaintiff as well, was dismissed by Gray, C. J., the equity rules of the Massachusetts court forbidding an attorney to act in this dual capacity. But that case, too, is distinguishable, since it expressly goes upon the ground that the attorney was not authorized by the particular plaintiff to file the bill in his behalf, whereas this state's attorney had clear authority to act for the people of the state.[15] Perhaps a North Carolina case [16] is more closely analogous to the case in hand. There an attorney acted for both parties to a controversy and upon his motion judgment was entered against one of them in favor of the other. The former was allowed to vacate the judgment. Yet the distinction between the cases is surely clear. In that case, the attorney acted for both parties at the same time and the defendant did not have the benefit of independent counsel;

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[9] 125 N. E. 268 (Ill. 1919). See RECENT CASES, p. 859.

[10] Earl Cholmondeley *v.* Lord Clinton, 19 Ves. 261 (1815).

[11] Bowman *v.* Bowman, 153 Ind. 498, 55 N. E. 422 (1899); Commonwealth *v.* Gibbs, 4 Gray (Mass.), 146 (1855).

[12] *Supra*, note 9.

[13] 3 Bing. 423 (1826). The complete report of that case is, "The attorney for the plaintiff having put in bail for the defendant, and having acted on both sides, deluding the parties and preventing an interview, the court, on the motion of Wilde, Serjt., set aside the proceedings, and made the attorney pay the costs."

[14] 115 Mass. 112 (1874).

[15] ILL. REV. STAT. 1874, p. 787.

[16] Wilson Cotton Mills *v.* Randleman Cotton Mills, 116 N. C. 647, 21 S. E. 431 (1895).

in this case, neither of those circumstances existed. And while it was necessary for the ends of justice to undo the whole transaction, in the North Carolina case, no such heroic treatment seems called for here. But, finally, there is the case of *State* v. *Rocker*.[17] In that case, the prosecuting attorney who appeared before the grand jury and procured the indictment of the defendant had learned the facts of the defendant's case while acting as his counsel, previously. These facts appearing, a motion to quash the indictment was sustained on the ground that the indictment was improperly brought.[18] That result may have been proper in that case, but there is no reason to extend its application to a case where there is no suggestion that there was anything improper in the action of the state's attorney in presenting the petition and filing the information in *quo warranto*, without any reliance upon his own knowledge but entirely at the instance of individual relators. On the whole, there seems to be no interest of the defendants which required forcing the state to file an entirely new information. They would have been fully protected, it is believed, if they had been restricted to their recognized right, by way of motion or injunction, to have the state's attorney excluded from appearing against them at the trial, and by having the proceeding conducted by the attorney-general or by a special state's attorney appointed for the purpose.

A JUDGMENT AS EVIDENCE IN A LATER PROCEEDING. — Every judgment has a double aspect: it is first an indication that the tribunal has made a finding as to the facts and rights upon which the applicant predicates his cause of action; it is also the *fiat* of the sovereign with reference to the cause of action, *res* or *status* before the court. In its aspect as a *fiat* of the sovereign, the judgment operates directly upon the subject matter of the action; in a personal action the cause of action is transmuted into a right; [1] in a divorce proceeding, *status* is determined; [2] while in an action of probate, the will is established.[3]

The first principle of *res judicata*,[4] that a plea of former judgment is a

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[17] *Supra*, note 7.

[18] *Cf.* State *v.* Will, 97 Ia. 58, 65 N. W. 1010 (1896). In this case, the improper conduct of the judge toward the grand jury was similarly held, in the same jurisdiction, to render an ensuing indictment invalid.

[1] As instances of this effect, note that a judgment, though without satisfaction, against one of two joint tort-feasors, or joint obligors, is a bar to an action against the other, for the cause of action, being single, is extinguished by the first judgment. Brinsmead *v.* Harrison, L. R. 7 C. P. 547 (1872); King *v.* Hoare, 13 M. & W. 494, 504 (1844).

[2] Hood *v.* Hood, 110 Mass. 463 (1872).

[3] "The proceeding is, in form and substance, upon the will itself. . . . The judgment . . . determines the *status* of the subject matter of the proceeding . . . and makes the instrument, as to all the world, . . . just what the judgment declares it to be." Hall, J., in Woodruff *v.* Taylor, 20 Vt. 65, 73 (1847).

[4] "The doctrine of *res judicata* is plain and intelligible, and amounts simply to this: that a cause of action once finally determined, without appeal, between the parties, on the merits, by a competent tribunal, cannot afterward be litigated by new proceedings either before the same or any other tribunal." Foster *v.* The Richard Busteed, 100 Mass. 409, 412 (1868).